Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-624

RICHARD F. NESTLER, *et al.*,
*Petitioners,*

v.

EXXON CORPORATION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | i |
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 5 |
| CONCLUSION | 9 |
| APPENDIX | 1a |


## TABLE OF AUTHORITIES


*Adickes v. S. H. Kress & Co.*,
398 U.S. 144 (1970) . . . . . 6

*Cooper v. Aaron*,
358 U.S. 1 (1958) . . . . . 6

*Fortner Enterprises, Inc. v. United States Steel Corp.*,
394 U.S. 495 (1969) . . . . . 6

*Ligouri v. New York, N.H. & H.R. Co.*,
26 F.R.D. 565 (D.C.Conn. 1961) . . . . . 8

Page

*Norfolk Monument Co. v. Woodlawn Memorial Gardens*,
394 U.S. 700 (1969) . . . . . 6

*Poller v. Columbia Broadcasting System, Inc.*,
368 U.S. 464 (1962) . . . . . 5, 8

*Robert Stigwood Group, Ltd. v. O'Reilly*,
530 F.2d 1096 (2d Cir. 1976) . . . . . 6

*Simler v. Conner*,
372 U.S. 221 (1962) . . . . . 7

*Wang v. Lake Maxinhall Estates, Inc.*,
531 F.2d 832 (7th Cir. 1976) . . . . . 6

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Richard F. Nestler, Donald B. May, and Nestler-May Company, respectfully pray that a writ of certiorari be granted to review the judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit.

## OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit for which review is sought is captioned Richard F. Nestler, et al., Appeallants, v. Exxon Corporation, Appellee, No. 76-1652,

argued May 5, 1977, decided June 1, 1977, and printed as an appendix to this petition at page 1a.

## JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 1, 1977. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether the granting of summary judgment in this antitrust case is inconsistent with this Court's opinion in *Poller v. Columbia Broadcasting System, Inc.*, 268 U.S. 464 (1962).

2. Whether denial of petitioner's motion under Rule 39(b) Federal Rules of Civil Procedure, is unconstitutional as applied in this case.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

## STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, 28 United States Code:



Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of a party.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39. Trial by Jury or by the Court

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Rule 56. Summary Judgment.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is

asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

## STATEMENT OF THE CASE

Richard F. Nestler, Donald B. May, and Nestler-May Company, a limited partnership, (hereinafter "Nestler"), appellants below and petitioners in this Court, have alleged that Exxon Corporation ("Exxon"), appellee below, engaged in activity proscribed by the antitrust laws of the United States in that Exxon, together with its affiliates and subsidiary corporations and divisions, induced Nestler to grant to Exxon an exclusive license to Nestler's patent for a nested-bag process, blocked access to nested-bag machinery, and failed to produce bags, thereby destroying the business of Nestler. The appellants also have alleged breach of three contracts between the parties, the patent



licensing agreement, an agency agreement, and a subsidy agreement.

In a memorandum opinion, the district court granted summary judgment for Exxon on both antitrust and contract grounds, notwithstanding plaintiffs' uncontroverted affidavits of fact. The court also refused to grant appellants' motion for a jury trial pursuant to Rule 39(b), F.R.C.P.

In a memorandum opinion (App. 1a), the court of appeals affirmed the district court's order granting summary judgment and therefore found it unnecessary to reach the jury trial question.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S OPINION IN *POLLER V. COLUMBIA BROADCASTING SYSTEM, INC.*, 368 U.S. 464 (1962).

This Court has declared in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), that:

> "(S)ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which has so long been the hallmark of 'even handed justice'." (footnote omitted)

*Id.* at 473.

This Court has consistently adhered to the rule stated in *Poller*. *See, e.g., Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 704 (1969); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969).

Petitioner herein presented genuine issues of fact which involved questions of motive and intent. As indicated in *Poller*, summary proceedings are wholly inappropriate in such a case. In the instant case the respondent has filed no affidavits to support its motion for summary judgment. Petitioner, on the other hand, filed three uncontroverted affidavits in opposition to respondent's motion for summary judgment. It has consistently been held in the various circuits that facts supported by affidavit must be taken as admitted if they are not opposed by affidavit by the other party. *See, e.g., Wang v. Lake Maxinhall Estates, Inc.*, 531 F2d 832, 835 (7th Cir. 1976); *Robert Stigwood Group, Ltd. v. O'Reilly*, 530 F2d 1096, 1100 (2d Cir. 1076). Indeed, this principle has been affirmed by this Court. *Adickes v. S. H. Kress & Co.*, 394 U.S. 144, 158 (1970).

It is the obligation of all of the federal courts to enforce Article VI of the Constitution which makes it the "supreme law of the land". *Cooper v. Aaron*, 358 U.S. 1 (1958). That principle has always been respected by this Court and its interpretation of the Constitution and the laws pursuant thereto must be taken as the supreme law of the land by the lower federal courts. *Id.* at 18. The trial court and the court of appeals in the instant case have violated their obligations under Article VI and the decisions set forth by this Court. These principles or orderly judicial process must be enforced by this Court.



The decision of the court of appeals, affirming the district court's granting of summary judgment, has so far departed from the accepted and usual course of judicial proceedings mandated by this Court, as to call for an exercise of this Court's power of supervision. This justifies the grant of certiorari to review the judgment below.

**2. DENIAL OF PETITIONER'S MOTION UNDER RULE 39(b), F.R.C.P., IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.**

Rules 38(d) and 39(b) of the Federal Rules of Civil Procedure are unconstitutional as applied by the district court and affirmed by the court of appeals in this case in that they operate to deny petitioner the right to a trial by jury as guaranteed by the Seventh Amendment.

The Seventh Amendment to the United States Constitution is an affirmative guarantee of the right to a jury trial. It is not a negative guarantee which only becomes operative upon demand.

In accord with the Seventh Amendment, Rule 38(a), F.R.C.P., provides "(T)he right to a trial by jury . . . shall be preserved inviolate." It thus embraces the very spirit and intent of the Seventh Amendment which sought to guarantee to Americans forever the right to have important civil disputes determined by a jury of their peers as was the custom at common law.

Rule 38(d), providing that jury trial is waived unless demanded in apt time, flies in the face of the unequivocal language of both the Seventh Amendment and Rule 38(a). The constitutional right to a jury trial under the Seventh Amendment is a fundamental right and "(t)he federal policy favoring jury trials is of historic and continuing strength", *Smiler v. Conner*, 372 U.S. 221, 222 (1962).

Rule 39(b), F.R.C.P., however, provides a safety valve designed to cure the harshness of Rule 38(d) waivers. Notwithstanding the failure of a party to demand a jury trial in an action in which such a demand might have been made, the court may in its discretion and upon motion order a trial by jury of any or all issues, absent some overwhelming reason to the contrary.

In failing to grant petitioner's motion for jury trial the district court has grossly abused its discretion as did the court of appeals in refusing to reach this fundamentally important question. (App. 1a).

The decision of the district court, as affirmed by the court of appeals, has followed a considerable number of decisions which take a very strict view of Rule 38(d) and refuse to relieve a party from the self-executing waiver of jury trial unless there are special circumstances excusing the failure to make a timely demand. One court has even boasted that "(i)t has been the unbending practice of this court for many years not to order a jury trial once it has been waived." *Ligouri v. New York, N.H. & H.R. Co.*, 26 F.R.D. 565, 568 (D.C. Conn. 1961).

It is urged that such decisions have established dangerous precedent and thus put the emphasis in the wrong place. This controversy therefore presents an important constitutional question that has not heretofore been decided, but should be decided by this Court.

This Court has made it abundantly clear that in civil antitrust cases a jury is necessary to determine the inherent questions of fact involving motive and intent. *Poller v. Columbia Broadcasting System, Inc.*, 268 U.S. 464 (1962). Denial of petitioner's motion under Rule 39(b), F.R.C.P., for a jury trial which was made in a timely fashion after



the record was developed to a point where it was evident that the issues involved, motive and intent, could not be resolved on the basis of documentary evidence, renders Rule 38(b) unconstitutional as applied in this case.

Special and important reasons exist for the granting of certiorari in this case because the decision of the court of appeals has sanctioned a departure from the mandates of this Court which operates unconstitutionally to deprive petitioner of his fundamental right to a trial by jury.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

CARL L. SHIPLEY
*Counsel for Petitioners*

# APPENDIX

(Judges Bazelon, Leventhal and Robinson)

## MEMORANDUM

Plaintiff contends that the District Court erred in failing to grant the belated application for a jury trial. We need not reach that question because we affirm the District Court's order granting summary judgment and dispensing with trial entirely.

Appellant's counsel vigorously contended at oral argument that the District Court had not fairly granted opportunity for discovery. However, we find that the District Court granted plaintiff ample opportunity for discovery. Exxon's first motion for summary judgment was denied for that reason. In addition to interrogatories and introduction of documents, plaintiffs noticed a series of depositions, but stopped after taking the deposition of John McClintock. When Exxon renewed its motion for summary judgment, both counsel rested on the affidavits, documents and depositions in the court's file.

The contract claims are adequately treated by the District Court, and plaintiff's counsel really rested on the claims under the Sherman Act, with the contract claims serving their purpose, presumably, as background and perhaps as predicate for discovery.

On the antitrust claims, we are mindful of the rule of *Poller** that summary judgment is to be granted only sparingly in antitrust cases, but in this case it was proper.

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* Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

Even in antitrust cases there is a duty to provide some specific indication of what evidence might be adduced at trial as contrasted with generalized accusations. *The Poster Exchange, Inc. v. National Screen Service Corp.*, 542 F.2d 255 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3718 (May 2, 1977).

There is not even a glimmer of a showing of a market that Exxon is either monopolizing or has attempted to monopolize.

The undisputed evidence shows that Exxon entered into a triad of agreements with Nestler, and his company, which would have had the effect of exploiting, to the mutual advantage of the parties and the public, his nested bag invention that would add speed and reduce costs in supermarkets. This included a "subsidy" by Exxon to plaintiff for early production expenses, including payments to Sheldahl, the manufacturer of the machines needed to produce the bags.

Unfortunately, plaintiff's concept, at least in its present form, did not result in commercial success. And that's all the proof shows. There are allegations that at the outset Exxon prevented plaintiff from reaching similar agreements with other companies, but these rest only in speculation and surmise without support in proferred evidence. There is also an assertion that after Exxon tried to cut out of the project in 1971 and came back later in 1971 to fullfill its contract obligations, it was not vigorous enough and limited sales to Kroger and two other chains. This is tied into an allegation of a plan of Exxon to appropriate the concept and its commercial exploitation. Again, there is no proferred evidence beyond sheer speculation, speculation of a kind that obviously runs athwart of the fact



that as soon as it could terminate the project under the contracts, Exxon did so.

This leaves plaintiff with the claim that there was a forbidden conspiracy in restraint of trade in that Exxon precluded plaintiff's having access to Sheldahl, the manufacturer, and hence to the machines necessary for production. As to this, the District Court stressed that the proof showed that when the Exxon contracts were terminated in 1973, plaintiff had the contractual rights to proceed; that it sought and obtained a quotation from Sheldahl; yet never bought a machine. Plaintiff says he was too poor by then, the victim of Exxon's deliberate plan to destroy him rather than let the idea be exploited. This is not inconceivable in theory, but if it is to be a predicate for using the overburdened judicial machinery, it must have support in more than bitterness and suspicion.

It is ironic and revealing that the only specific item that might have provided a wedge for a trial – the October 21, 1971 letter from Mr. McClintock to Nestler-May – was not even included in the appendix filed by plaintiff in this court. Plaintiff has not cited the deposition of Mr. McClintock as pursuing the subject of the letter. And plaintiff did not actually take the deposition that had been noticed from Dr. John McCullough of Exxon, whom Sheldahl identified as the person whose consent was necessary before Sheldahl could supply Nestler-May with the machines.

The fact that Exxon entered into an exclusive agreement with Sheldahl is not of itself evidence of an attempt to exclude Nestler-May from the machines. The fact is that from 1968 to 1971 machines were supplied to Nestler-May from Sheldahl, and indeed were part of the Nestler expenses that Exxon subsidized. The October 1971 Sheldahl letter

did not deny plaintiff a quote, it merely stated that the matter would have to be reviewed by Exxon. It was sent during a relatively short period when there was some uncertainty whether Exxon would continue with the nested-bags venture. There is no indication at that time whether Nestler would have been denied access to Sheldahl by Exxon, if the Nestler-Exxon venture disbanded. Nestler was at that time insisting on continuance of the venture, and later in 1971 Exxon did resume the nested-bag venture under its agreements with Nestler. In 1973 when Exxon no longer had the exclusive license, and Nestler-May was free to manufacture on its own account, it was offered machines by Sheldahl, as duly pointed out by the District Court.

As the case was presented to the District Court by counsel and the plaintiff, the District Court properly granted summary judgment.

*Affirmed.*

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OCTOBER TERM, 1977

No. 77-624

RICHARD F. NESTLER, *et al.*,
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## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## INDEX


| | Page |
|---|---|
| MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, May 12, 1976 . . . . . | 1b |
| ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA . . . . . | 15b |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| RICHARD F. NESTLER, et al., Plaintiffs, | : | |
| v. | : | C.A. No. 1686-73 |
| EXXON CORPORATION, Defendant. | : | |

APPEARANCES: *For the Plaintiffs:*

Carl L. Shipley, Esquire
Washington, D.C.

*For the Defendant:*

James C. McKay, Esquire
Matthew F. Medeiros, Esquire
Washington, D.C.

[Filed May 12, 1976]

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This lawsuit, involving alleged contract and antitrust violations by the defendant Exxon, is before the Court on defendant's motion for summary judgment and plaintiffs' opposition thereto. The Court has concluded that there are no material facts in dispute and that defendant is entitled to judgment as a matter of law. Accordingly, for the reasons stated in this Memorandum Opinion, the Court will grant summary judgment for defendant.

## I. BACKGROUND

For the sake of demonstrating that there are no material facts in dispute, the Court will adopt, for the purposes of this motion only, plaintiffs' somewhat colored statement of the background to this lawsuit, as set forth below:

> "Plaintiff Nestler was an employee of the Kroger Grocery Company, a supermarket chain. In 1966 and 1967, based on his experience and observation, he conceived the idea that he could cut the time and cost of packaging grocery items purchased by customers roughly in half by using polyethylene bags, nested in a special device he invented, and "cuffed," with numbers of bags inserted one within the other, and the entire "process" located at the check-out counter where the customer pays his cash and picks up his groceries. In pursuance of this novel and useful concept and process, he established a factory, developed private financing, hired 40 people, and went into the business of producing the Nestler-May* nested bag concept. Bags were provided to various customers on an ever increasing business-volume basis during 1966 and 1967. As the economic benefits and utility of the Nestler-May process were more

*Plaintiff Donald B. May is a partner with Nestler in the nested bag enterprise. The official name of their partnership is Nestler-May Company. All references hereinafter made by the Court to "Nestler" should be understood as references to the Nestler-May Company.



> widely understood in the industry, Nestler became involved in negotiations with a half dozen major companies, all of whom were interested in finding new market outlets for resins, the raw material from which polyethylene bags are made, which is one of the many petroleum products of substantial value produced by Exxon, and the other companies listed in the various documents in support of this memorandum. Exxon Corporation and its subsidiaries and affiliates was one of the competitiors [sic] to obtain a license to develop and market the Nestler-May process. Exxon Corporation induced and enticed Nestler to drop negotiations with the other competitors and enter into negotiations with Exxon, making the material representations Exxon was the biggest, best financed and oldest petroleum producer in the country, and was keenly interested in developing a new market for resins. In reliance on these representations, Nestler entered into a series of agreements with Exxon's affiliates and subsidiaries,** whereby Exxon was to move forward with financing the cost of manufacturing nested bag machines, and the cost of developing an increasing market for the Nestler-May nested bag process." Plaintiffs' memorandum in opposition to summary judgment, at 7–8.

**The agreements with plaintiffs were entered into by an entity known as Extrudo Film Corporation. Exxon became the successor to Extrudo after the agreements were made.

The agreements referred to above were all made on August 1, 1968. The first agreement was a subsidy arrangement whereby Exxon agreed to make several payments to Nestler to cover excess operating costs. The payments totalled $70,000 and were to be paid over the course of one year. The second agreement was an agency agreement whereby Nestler was made a non-exclusive commission agent for the sale of nested bags, to be produced by Exxon. The third agreement was a license agreement whereby Nestler granted Exxon his patent right to make, use, and sell nested plastic bags.

In 1969, two amendments were made to the subsidy agreement, one accelerating the payment of the total subsidy to Nestler and the other extending further financial assistance to Nestler for a period of six months beyond the time of the original agreement. The agency agreement was also amended in 1969 to provide for a different method for the computation of commission payments to Nestler. None of the amendments otherwise affected the terms or validity of the original contracts.

The subsidy relationship expired, by the terms of the amendment referred to above, early in 1970. Despite some sales of nested bags in the early years of the relationship, the Nestler-Exxon joint endeavor was not financially successful. As a result, the agency agreement was terminated by Exxon, pursuant to the terms of the agreement, on August 1, 1973. The license agreement remains in effect.[1]

[1]The existence and written terms of the three agreements is beyond dispute. See Complaint, ¶5, 6, 7; defendant's exhibits 13, 16, 18. A review of plaintiffs' opposition to defendant's statement of material facts discloses that plaintiffs do not question the existence and written terms of those agreements, but allege that defendant neglected to add pertinent facts surrounding the making of the agreements but not referred to in those agreements. The legal significance of those additional facts is discussed at page 5, *infra*.



In August of 1973, less than a month after Exxon terminated the agency agreement, Nestler filed this lawsuit. The suit alleges both contract and antitrust violations. The alleged contract violations are set forth in the following excerpt from plaintiffs' complaint:

> "Defendant has violated said agreements by failing and refusing to manufacture or cause to be manufactured the nested plastic bag production process and apparatus owned by plaintiffs and exclusively licensed to defendant as outlined hereinabove, and has failed and refused to deliver said bags and equipment to customers on orders developed by plaintiffs as defendant's sales agent, and has failed and refused to develop production capacity or provide capacity forecasts so plaintiffs can further develop the market and service existing and expanding installations, and has failed and refused to provide plaintiffs with any accounting or payment of royalties or sales commissions, and has notified customers that bag orders will not be filled, and otherwise has destroyed plaintiffs business." Complaint, ¶12.

The antitrust allegations are as follows:

> "Plaintiffs allege and verily believe that defendant, together with its affiliate and subsidiary corporations and business divisions, entered into, carried out, and are carrying out an arrangement, conspiracy, concerted effort, and plan of common, cooperative and unified action to obtain and keep the exclusive license to make, use, and vend the Nestler-May sys-

> tem described herein, and then using said patents, processes, and licenses unreasonably to restrain trade and to monopolize and attempt to monopolize trade and commerce among the states by failing and refusing to make, use and vend the Nestler-May system, while at the same time excluding plaintiffs or any other person or company from making, using and vending the system in the U.S., thus depriving the public of the benefits of competition and the benefits of using plaintiffs' system." Complaint, ¶ 14.

Plaintiffs demand judgment in their complaint in the amount of $36,213,250.00.

## II. THE CONTRACT CLAIMS

Turning to the merits, the Court quickly disposes of plaintiffs' contract claims.

As to the subsidy agreement, a close reading of plaintiffs' complaint reveals that whatever plaintiffs' alleged violations are, they do not seem to go to the subsidy agreement. Plaintiffs do not deny in the complaint that all of the payments provided for were made and that the agreement expired by its own terms.[2] In his deposition, plaintiff Nestler suggested, apparently for the first time in this case, that he had come to an oral agreement with defendant Exxon that Exxon would continue to make subsidy payments to him until he was able to "break even."[3] This contention is not made in plaintiffs' complaint. In any

[2] *E.g.*, Complaint ¶7, 12; see also defendant's exhibit 13.

[3] Nestler deposition, pp. 306-07, 312-17; see also plaintiffs' opposition to defendant's statement of material facts, ¶6, 8.



event, it is a contention of no value in this case, as the parol evidence rule would prevent its use to modify the terms of the written, final agreement. *See* 30 Am. Jur.2d *Evidence* §1016 (1967). Thus, the Court concludes that defendant fully performed under the subsidy agreement.

Plaintiffs' major contention with respect to the agency agreement is that defendant Exxon refused to fill orders for nested bags obtained by Nestler, as agent, and generally refused to participate in the nested bag project. Once again, the plain terms of the contract establish that Exxon committed no breach. For example, the agreement provided that defendant "may on its sole discretion accept or reject any . . . order procured . . . by Agent."[4] It also provided that "this agreement does not and shall not be deemed to obligate the Company to embark upon the manufacture or sale of such bags or any product mentioned herein nor to continue any such manufacture or sale for any period of time."[5] Plaintiffs also apparently object to the termination of the agency agreement, but, again, the plain terms of the contract establish either party's right to terminate, without cause, after five years.[6] The exhibits in this case establish that defendant's termination was perfectly proper within the terms of the contract.[7]

As to the license agreement, the only violation seemingly asserted by plaintiffs is defendant's failure to pay royalties as provided for by that agreement. The payment of royalties is dependent upon production of nested bags

[4] Defendant's exhibit 16, ¶3.

[5] *Id.*, ¶11.

[6] *Id.*, ¶14.

[7] See *Id.* and defendant's exhibits 53, 54, 55.

under the agreement,[8] so plaintiffs' claim necessarily relates back to defendant's failure to produce. As noted above, defendant was not obligated to produce nested bags. Thus, there was no violation of the royalties provision of the licensing agreement.

Defendant makes a convincing argument that it is also entitled to summary judgment because of the absence of indispensable parties to this case. Defendant alleges that plaintiffs have assigned their patent rights to certain parties and the rights to all profits made from the nested bag system to other parties. Plaintiffs counter with "powers of attorney" for some of the parties involved, but the legal significance of those "powers of attorney" is not discussed by plaintiffs, and the other parties remain unaccounted for in this case.

This Court need not reach the "indispensable parties" issue, however, because, as noted above, it has concluded that defendant has shown beyond doubt that all of the terms of the contracts involved were met. Plaintiffs' attorney seemed to recognize as much by failing to make substantive responses to that portion of defendant's memorandum in support of summary judgment dealing with the contract claim. Plaintiffs' attorney also admitted at oral argument that it was the antitrust portion of his complaint, not the contract claims, on which he pinned his only realistic hopes for success.

For all of the above reasons, the Court concludes that plaintiffs' contract claims have no legal merit; defendant is therefore entitled to summary judgment.

---

[8]Defendant's exhibit 18, ¶3.02.



## III. THE ANTITRUST CLAIM

While requiring slightly more sophisticated analysis than the contract claims, the plaintiffs' antitrust claim is also devoid of legal merit. Summary judgment for defendant is therefore warranted.

The Court begins by noting that plaintiffs' complaint alleging an antitrust violation by defendant does little to enlighten defendant or any other reader as to the nature of or underlying facts supporting the claim. This vagueness in itself could, as defendant claims, very well provide cause for dismissing this complaint, not only for a failure to satisfy the pleading requirements of F.R.Civ.P. 8, *see Heart Disease Research Foundation v. General Motors,* 463 F.2d 98, 100 (2d Cir. 1972); but also for a failure to meet the general pleading requirements in antitrust cases, *see Beegle v. Thomson,* 138 F.2d 875, 881 (7th Cir. 1943), *cert. denied,* 322 U.S. 743 (1944). However, the Court need not reach these issues, in light of the conclusions reached below.

The first time the plaintiffs' antitrust claim was set forth in any kind of detailed fashion was in their opposition to the instant motion for summary judgment. The critical portions are as follows:

> "During 1966 and 1967, Nestler had obtained a machine from the G.T. Scheljdahl Company (now Sheldahl) of East Providence, Rhode Island, at a cost of $23,000.00, and was using that machine in producing the bags as a part of the Nestler-May process. In early 1967, Nestler had disclosed to Exxon the nature of his process to the extent necessary to carry on preliminary negotiations. Exxon, once learning that Sheldahl was the only

source of the nested-bag machine, secretly and without the knowledge of Nestler and prior to concluding negotiations with Nestler, went to Sheldahl and apparently entered into an agreement so that Exxon had a monopoly of this sole source of nested-bag machines. Thereafter, without disclosing this maneuver to Nestler, Exxon went ahead and negotiated various contracts and license agreement with Nestler, all as set out in the exhibits and statements of issues submitted herewith. Once Nestler had entered into agreements giving Exxon an exclusive license in the United States and a non-exclusive license throughout the world to make, use and vend the Nestler-May process, with the exception that Nestler could compete with the process within the United States, Exxon undertook a calculated and planned program to squeeze Nestler out of business and destroy Nestler-May as a going concern, leaving Exxon with monopoly control of the United States license, and Nestler shut off from obtaining a nested bag machine to use in competition with Exxon, all as set out in the verified complaint and other affidavits and documents submitted herewith." Plaintiffs' memorandum in opposition to summary judgment, at 8–9.

Thus, the elements of the antitrust violation alleged by plaintiffs are that Exxon first arranged to gain sole access to nested-bag machines and then entered into agreements with Nestler, all the while planning not to use the license rights it acquired, thereby eliminating Nestler as the only competition in the nested bag field.



Plaintiffs pin their hopes on a legal determination that non-use of a patent right by the lawful holder of that right can, in certain circumstances, give rise to an antitrust violation. But theirs is a difficult row to hoe. A non-use doctrine in antitrust law is nearly non-existent. As one commentator has noted, "a patent owner is ordinarily free not only to keep his invention to himself but also to refrain from using it at all." E. Rockefeller, *Antitrust Questions and Answers*, at 352 (1974). Another commentator has stated:

> ". . . [I]t is clear that the non-use of patents could not be *per se* an antitrust offence or a bar to relief against infringement: any such rule would be unworkable. This is because there are many good [economic] reasons for not practising particular patents." A.D. Neale, *The Antitrust Laws of the United States*, at 340 (1970).

Moreover, the Supreme Court "has consistently held that failure of the patentee to make use of a patented invention does not affect the validity of the patent. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405. . . ." *Special Equipment Co. v. Coe*, 324 U.S. 370, 378–79 (1945). *See also United States v. L.D. Caulk Co.*, 126 F. Supp. 693, 708 (D. Del. 1954).

It is true that there have been proposals for more stringent regulation of non-use of patent rights. Thus, the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) makes the following recommendation:

> "We believe that an improper purpose unduly to restrain trade, to monopolize or attempt to monopolize through individual nonuse

> should give rise to antitrust liability. On the other hand where there is no affirmative showing that the purpose or effect of nonuse is unreasonably to restrain trade, to monopolize or attempt to monopolize, the patentee's conduct does not transgress the antitrust laws." *Id.* at 231.

It appears that the Supreme Court has not faced the precise issues posed by the recommendation above. Nevertheless, even if this Court were to adopt the above recommendation as its guiding principle in this case, plaintiffs could not succeed; for, upon careful examination of all of the pleadings and exhibits in this case, the Court has concluded that plaintiffs have not produced any evidence upon which a finder of fact might conclude that defendant's purpose in failing to use its patent right was to perpetuate an unreasonable restraint of trade.[9] Plaintiff has not met

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[9]For example, defendant posed the following interrogatory to plaintiffs in the course of discovery:

> "Referring to paragraph 13 of the complaint, identify each 'affiliate' with which defendant allegedly engaged in 'concert of action,' the manner in which each such affiliate engaged in any such 'concert of action' in each instance, and the date or dates when any such 'concert of action' occurred in each instance." Defendant's interrogatory number 15.

In response, plaintiffs alleged that defendant and its subsidiaries "were constantly in a concerted exchange of information and activity respecting plaintiffs and their process." Plaintiffs proceeded to describe a number of business contacts concerning the nested bag process between various affiliates and subsidiaries of Exxon and, in some cases, plaintiffs themselves. None of these alleged incidents would even begin to establish any sort of conspiracy among affiliates and subsidiaries of Exxon. Plaintiffs also attach supporting docu-

(continued)



its burden in attempting to rebut defendant's motion for summary judgment. See F.R.Civ.P. 56(c); *see generally* 10 Wright and Miller, *Federal Practice and Procedure* §§2727 and 2729.

Finally, the foregoing discussion pertaining to nonuse of patents and the antitrust laws can be viewed as academic when it is realized that not only have plaintiffs failed to make an affirmative showing to support their claim, but also the factual linchpin upon which their whole antitrust case rests has been disproven beyond any doubt by defendant. As noted above, the critical elements of plaintiffs' claim are: (1) defendant blocked access to nested bag machinery, and (2) defendant purposefully declined to use its exclusive rights under the license in order to "squeeze out" Nestler, its only potential competitor in the nested bag field. As to the first element, defendant has shown, through exhibits to its motion for summary judgment, that, in 1973, Nestler requested a price quotation from the company which makes the nested bag machinery and received that quotation and an offer to sell.[10] Nestler apparently never took up the offer. Plaintiffs have not countered or explained this evidence. As to the second element, the licensing agreement specifically provides that

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[9] (Continued)
ments to their answer. All but two of these documents were written to or by plaintiffs themselves. Of the remaining two, plaintiff received a copy of one when it was written; the other is a letter from Exxon to a former customer. None of these documents begin to establish any sort of conspiracy. See defendant's interrogatory number 15 and plaintiffs' response thereto, attached to defendant's motion for summary judgment.

[10]See attachments to defendant's reply memorandum in support of summary judgment.

if Exxon did not produce nested bags, *Nestler would have the right to do so.*[11] Thus, the license was exclusive only so long as Exxon produced nested bags; once Exxon decided not to produce the bags, the monopoly created by the patent ceased to exist, at least to the extent that Nestler could then "compete."

For all of the above reasons, it is clear to the Court that defendant is entitled to summary judgment. An Order in accordance with the foregoing will be issued of even date herewith.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

Date: May 12, 1976

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[11] Paragraph 2.02 of the licensing agreement, see defendant's exhibit 18, reads as follows:

> "The license granted under Paragraph 2.01 of this Article II shall be exclusive except for NESTLER's Foreign Patent Rights which shall be non-exclusive, subject to the *reservation by NESTLER of a non-exclusive, non-transferable license in the United States under NESTLER's United States Patent Rights and Technical Information to make, use and sell Nested Plastic Bags, to practice Process and to extend to NESTLER's customers the right to use said Nested Plastic Bags under NESTLER's United States Patent Rights, Technical Information and Trademark Rights in the event and for such period of time that EXTRUDO shall not commercially manufacture, have manufactured for it or sublicense such manufacture under Paragraph 2.03 hereinbelow.*" (Emphasis added.)



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| RICHARD F. NESTLER, et al., Plaintiffs, | : | |
| v. | : | C.A. No. 1686–73 |
| EXXON CORPORATION, Defendant. | : | |

[Filed May 12, 1976]

ORDER

This case comes before the Court on defendant's motion for summary judgment. In accordance with the Memorandum Opinion in this case issued of even date herewith, it is, by the Court, this 12th day of May, 1976,

ORDERED, that defendant's motion for summary judgment be, and the same hereby is, granted, and the complaint in this action be, and the same hereby is, dismissed with prejudice.

/s/ Charles R. Richey
Charles R. Richey
United States District Court

Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

No. 77-621

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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RICHARD F. NESTLER, ET AL., *Petitioners,*

*v.*

EXXON CORPORATION, *Respondent.*

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## OPPOSITION OF EXXON CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT OF THE CASE | 2 |
| ARGUMENT | 4 |
| 1. Petitioners' Jury Trial Contention | 4 |
| 2. Petitioners' Antitrust Argument | 7 |
| CONCLUSION | 10 |


## INDEX OF AUTHORITIES

CASES:


| | |
|---|---|
| *Bush* v. *Allstate Insurance Company*, 425 F.2d 393 (5th Cir. 1970) | 5, 6 |
| *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 259 (1968) | 7 |
| *General Tire & Rubber Company* v. *Watkins*, 331 F.2d 192 (4th Cir. 1964), *cert. denied*, 377 U.S. 952 (1964) | 5 |
| *Moore* v. *United States*, 196 F.2d 906, 908 (5th Cir. 1952) | 5 |
| *Murphy* v. *Shelby*, 353 F.2d 418 (8th Cir. 1965) | 5 |
| *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) | 1, 6, 7 |
| *Tomlin* v. *Pope & Talbot, Inc.*, 282 F.2d 447 (9th Cir. 1960) | 5 |
| *United States* v. *Moore*, 340 U.S. 616, 621 (1951) | 5 |


RULES:


| | |
|---|---|
| Federal Rules of Civil Procedure | |
| Rule 38(b) | 2, 4 |
| Rule 38(d) | 5 |
| Rule 39(b) | 2, 5, 6 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-624

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RICHARD F. NESTLER, ET AL., *Petitioners,*

*v.*

EXXON CORPORATION, *Respondent.*

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## OPPOSITION OF EXXON CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners seek a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petitioners assert that the Court of Appeals' decision affirming summary judgment entered by the United States District Court for the District of Columbia is inconsistent with this Court's decision in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Petitioners also assert that the denial by the District Court of petitioners' belated demand for a jury trial violated the Seventh Amendment to the Constitution of the United States.[1]

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[1] The Court of Appeals did not reach the question relating to petitioners' jury demand because it affirmed the District Court's order granting summary judgment. (See Petitioners' appendix, p. 1a).

## COUNTERSTATEMENT OF THE CASE

Petitioners originally based their action primarily on alleged breach by Respondent of three agreements entered into by the parties on August 1, 1968. The so-called antitrust claim which was thrown in for good measure is found only in one paragraph of the complaint, and consists of vague and general allegations charging conspiracy to monopolize, monopolization and attempted monopolization by Respondent of unspecified "trade and commerce" among the states of the United States.

Petitioners failed to demand a jury trial on any issue involved in the complaint within the time limit prescribed by Rule 38(b) of the Federal Rules of Civil Procedure. Respondent likewise made no jury demand.

More than four months after Respondent's answer was served, Petitioners filed and served a jury demand. Thereafter, the District Court struck Petitioners' jury demand on the ground that it was "untimely having been made four months after the last pleading was filed, and there being inadequate reason shown to cause the Court to exercise its discretion under Rule 39(b) of the Federal Rules of Civil Procedure."

On April 12, 1974, Petitioners petitioned the Court of Appeals for a writ of mandamus directing the District Court to vacate its order striking the jury demand. That petition was denied on April 25, 1974.

Thereafter, on July 25, 1974, Petitioners' petitioned this Court for a writ of certiorari directed to the Court of Appeals. (No. 74-10). That petition was denied on October 15, 1974.



Respondent's initial motion for summary judgment was filed on June 18, 1974, but was denied on November 11, 1974, without prejudice pending completion of discovery. When discovery was completed, Respondent renewed its motion for summary judgment. That motion was granted on May 12, 1976.

The essential charges alleged in Petitioners' complaint are set out in the opinion of the District Court which is reproduced at page 1b-14b of Petitioners' supplemental appendix filed herein. The antitrust claim, which is specifically referred to at pages 9b-14b thereof, needs to be considered in the light of the contract claims which, as stated, originally constituted the heart of Petitioners' complaint.

As noted by the opinion of the District Court, it was difficult to sort out with any assurance the rambling and vague assertions which constituted Petitioners' antitrust claims. The District Court concluded that "the elements of the antitrust violation alleged by plaintiffs are that Exxon first arranged to gain sole access to nested-bag machines and then entered into agreements with Nestler, all the while planning not to use the license rights it acquired, thereby eliminating Nestler as the only competition in the nested bag field." (Petitioners' supplemental appendix, p. 10b).

As the District Court went on to say, the facts of record did not support those contentions. Those record facts went far beyond the rambling, self-serving affidavits filed by Petitioners.[2] The District Court had before it a three-day deposition given by the principal

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[2] It is noteworthy that Petitioners have not included copies of these affidavits in their petition.

petitioner, Richard F. Nestler, a deposition of a representative of the bag machinery manufacturer, and exhibits identified in connection therewith, as well as the sales agency and the patent license agreements entered into by the parties. None of these documents is discussed in the petition filed herein. None of them was in dispute; and it is clear from the District Court's opinion that it relied upon those documents in entering summary judgment.

## ARGUMENT

### 1. Petitioners' Jury Trial Contention

The claim of Petitioners that their Seventh Amendment rights were violated by the District Court's refusal to grant the belated jury demand was previously brought before this Court when Petitioners filed their petition for a writ of certiorari in No. 74-10. That petition was denied. There have been no changes in circumstances which would now justify a granting of the present petition on that issue. Accordingly, for that reason alone, the Court should deny that portion of the petition for a writ of certiorari seeking review of the District Court's denial of Petitioners' jury demand.

That portion of the petition should, in any event, be denied. Rule 38(b) of the Federal Rules of Civil Procedure provides in part as follows:

> "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue."



Rule 38(d) provides in part as follows:

> "The failure of a party to serve a demand as required by this rule . . . constitutes a waiver by him of trial by jury."

As noted above, neither the Petitioners nor Respondent made a jury demand within 10 days after the service of the answer. Petitioners waited for more than four months following serving and filing of interrogatories, and several weeks after they were answered, before filing their jury demand. This clearly indicates that the belated jury demand was filed because, for some unknown reason, Petitioners changed their minds.

Petitioners' contentions are without merit as shown by decisions of this Court as well as several Circuit Courts. *United States* v. *Moore,* 340 U.S. 616, 621 (1951); *Bush* v. *Allstate Insurance Company,* 425 F.2d 393 (5th Cir. 1970); *Murphy* v. *Shelby,* 353 F.2d 418 (8th Cir. 1965); *General Tire & Rubber Company* v. *Watkins,* 331 F.2d 192 (4th Cir. 1964), *cert. denied,* 377 U.S. 952 (1964); *Tomlin* v. *Pope & Talbot, Inc.,* 282 F.2d 447 (9th Cir. 1960); *Moore* v. *United States,* 196 F.2d 906, 908 (5th Cir. 1952).

In *Tomlin* v. *Pope & Talbot, Inc., supra,* the appellant relied on the provisions of Rule 39(b) of the Federal Rules of Civil Procedure, just as Petitioners have done. However, the Ninth Circuit noted that this rule leaves it to the discretion of the court to decide whether or not to order a trial by jury where, as here, timely demand had not been made. The court said:

> "The view has been stated that as a matter of judicial administration discretion ought rarely to

be exercised to grant a trial by jury in default of a timely request for it. . . ."

"The denial of a motion made under this rule [39(b)] is to be sustained unless an abuse of judicial discretion is shown. See Johnson v. Gardner, 9 Cir., 179 F.2d 114, 118. For this reason appellate courts normally refuse to interfere. 5 Moore's Federal Practice, 2d ed., § 39.09, page 715." (282 F.2d at 449).

There is no basis for concluding that the District Court abused its discretion in striking Petitioners' belated demand. No valid reasons for taking such action were presented to the District Court, nor has any been presented to this Court.

In *Bush* v. *Allstate Insurance Company, supra,* the Fifth Circuit stated:

"It is not an abuse of discretion by a District Judge to deny a Rule 39(b) motion . . . when the failure to make a timely demand for a jury trial results from mere inadvertence on the part of the moving party." (425 F.2d at 396)

Petitioners' conduct here does not even rise (or fall) to the level of inadvertence. Rather, we have at best an admittedly deliberate decision not to demand a jury trial followed by a change of mind several months later.

Petitioners have cited no cases in support of their positions that the District Court abused its discretion in not granting its belated demand for a jury trial. The ruling in *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962), had nothing to do with the question of whether a court abused its discretion in refusing to invoke the provisions of Rule 39(b) of



the Federal Rules of Civil Procedure. Likewise, neither of the other two cases cited by Petitioners in this portion of their argument relate to the question which confronted the District Court in disposing of Petitioners' belated jury demand.

**2. Petitioners' Antitrust Argument**

The sole basis for Petitioners' argument on this point is that the decision of the Court of Appeals in the instant case is in conflict with the decision of this Court in *Poller* v. *Columbia Broadcasting System, Inc., supra.*

This Court has pointed out what would appear to be self-evident: That "the question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case." *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 259 (1968).

In the instant case, Petitioners were given every opportunity to develop through pretrial procedures some substantial basis for the vague and general antitrust claim contained in their complaint. They were unable to do so. As pointed out by the District Court, "the first time that plaintiffs' antitrust claim was set forth in any kind of detailed fashion was in their opposition to the . . . motion for summary judgment." (Petitioners' supplemental appendix, p. 9b). However, as also pointed out by the District Court, the undisputed agreements between the parties and exhibits of record refuted Petitioners' antitrust claim. Thus, the District Court made the following unchallenged findings:

"As noted above, the critical elements of plaintiffs' claim are: (1) defendant blocked access to

nested bag machinery, and (2) defendant purposefully declined to use its exclusive rights under the license in order to "squeeze out" Nestler, its only potential competitor in the nested bag field. As to the first element, defendant has shown, through exhibits to its motion for summary judgment, that, in 1973, Nestler requested a price quotation from the company which makes the nested bag machinery and received that quotation and an offer to sell. Nestler apparently never took up the offer. Plaintiffs have not countered or explained this evidence. As to the second element, the licensing agreement specifically provides that if Exxon did not produce nested bags, *Nestler would have the right to do so.* Thus, the license was exclusive only so long as Exxon produced nested bags; once Exxon decided not to produce the bags, the monopoly created by the patent ceased to exist, at least to the extent that Nestler could then 'compete.'

"For all of the above reasons, it is clear to the Court that defendant is entitled to summary judgment." (Emphasis in original). (*Id.* at p. 13b).

The views of the Court of Appeals were summed up in the following portion of that court's opinion:

> "It is ironic and revealing that the only specific item that might have provided a wedge for a trial—the October 21, 1971 letter from Mr. McClintock to Nestler-May—was not even included in the appendix filed by plaintiff in this court. Plaintiff has not cited the deposition of Mr. McClintock as pursuing the subject of the letter. And plaintiff did not actually take the deposition that had been noticed from Dr. John McCullough of Exxon, whom Sheldahl identified as the person whose consent was necessary before Sheldahl could supply Nestler-May with the machines.



> "The fact that Exxon entered into an exclusive agreement with Sheldahl is not of itself evidence of an attempt to exclude Nestler-May from the machines. The fact is that from 1968 to 1971 machines were supplied to Nestler-May from Sheldahl, and indeed were part of the Nestler expenses that Exxon subsidized. The October 1971 Sheldahl letter did not deny plaintiff a quote, it merely stated that the matter would have to be reviewed by Exxon. It was sent during a relatively short period when there was some uncertainty whether Exxon would continue with the nested-bags venture. There is no indication at that time whether Nestler would have been denied access to Sheldahl by Exxon, if the Nestler-Exxon venture disbanded. Nestler was at that time insisting on continuance of the venture, and later in 1971 Exxon did resume the nested-bag venture under its agreements with Nestler. In 1973 when Exxon no longer had the exclusive license, and Nestler-May was free to manufacture on its own account, it was offered machines by Sheldahl, as duly pointed out by the District Court.
>
> "As the case was presented to the District Court by counsel and the plaintiff, the District Court properly granted summary judgment." (Petitioners' Appendix, pp. 3a-3b).

It can be seen from the foregoing that both the District Court and the Court of Appeals ruled that summary judgment was supported by undisputed documentary evidence. Unlike the situation in the *Poller* case, motive and intent played no role whatsoever here; and the proof did not lie in the hands of alleged conspirators and hostile witnesses.

## CONCLUSION

In view of the foregoing, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

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